

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD WARD, RICHARD BONE, DAVID  
TYLER, ANTHONY ASHER, LEE PATTON,  
and SULLIVAN, WARD, BONE, TYLER &  
ASHER, P.C.,

Plaintiffs-Appellees/Cross-  
Appellants,

v

MICHELLE THOMAS,

Defendant-Appellant/Cross-  
Appellee.

UNPUBLISHED  
August 26, 2003

No. 238523  
Oakland Circuit Court  
LC No. 01-035163-CZ

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TYLER, ANTHONY ASHER, LEE PATTON,  
and SULLIVAN, WARD, BONE, TYLER &  
ASHER, P.C.,

Plaintiffs-Appellees,

v

MICHELLE THOMAS,

Defendant-Appellant.

No. 239424  
Oakland Circuit Court  
LC No. 01-035163-CZ

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Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

In Docket No. 238523, defendant appeals as of right, and plaintiffs cross-appeal, an order entering judgment on an arbitration award in this employment law case.<sup>1</sup> In Docket No. 239424,

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<sup>1</sup> Because distinguishing between the parties in this case is difficult, we will refer to defendant Michelle Thomas as “Thomas,” the plaintiff law firm as “the firm,” and the individual plaintiff  
(continued...)

Thomas appeals the trial court's granting of costs to the individual partners in this matter. We affirm the entry of the arbitration award in Docket No. 238523 and reverse the taxation of costs in Docket No. 239424.

Thomas originally filed suit against the firm and its individual partners, claiming discrimination and breach of contract. That case was dismissed when the parties agreed to arbitrate. The arbitrator awarded Thomas damages for breach of contract against the firm in the amount of \$7,500, and found in favor of the firm and individual partners with regard to the remaining claims. The firm and individual partners thereafter filed the present action to confirm the arbitration award.

All parties argue on appeal that the arbitration award should be vacated. Thomas claims that the arbitrator exceeded the scope of his authority under the arbitration agreement when he decided discovery matters, and the firm claims that the arbitrator erred as a matter of law in granting Thomas breach of contract damages against the firm for an oral at-will employment agreement. We disagree.

To begin, because the arbitration agreement between the parties did not specifically state that the award could be entered by the circuit court, and did not otherwise comply with the requirements of MCL 600.5035, the arbitration agreement in this case is a common-law agreement.<sup>2</sup> *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999); *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996). At common law, the grounds on which the courts may vacate an arbitration award include: (1) fraud on the part of the arbitrator or the parties; (2) gross unfairness in the conduct of the proceedings; (3) lack of jurisdiction in the arbitrator; and (4) violation of public policy. *Detroit Auto Inter-Insurance Exchange v Gavin*, 416 Mich 407, 441; 331 NW2d 418 (1982). Judicial review of a common law arbitration agreement is limited to instances of bad faith, fraud, misconduct or manifest mistake. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992), citing *Port Huron & N R Co v Callanan*, 61 Mich 22, 26; 34 NW 678 (1887). A court may not review an arbitrator's factual findings or decisions on the merits. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990).

We decline to address Thomas' claim that the arbitrator exceeded the scope of his authority by deciding discovery matters because Thomas did not appeal from the trial court's final order in the original action referring all matters, including discovery, to the arbitrator and dismissing the case.<sup>3</sup> Thomas' claim in the present case is a collateral attack on the final order

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(...continued)

partners of the firm as "the individual partners."

<sup>2</sup> We note that the Michigan Supreme Court recently granted leave on the issue of what language is required to make an arbitration agreement statutory instead of common law. *Papp v Mason*, 468 Mich 870; 659 NW2d 231 (2003).

<sup>3</sup> We note that Thomas filed a motion for superintending control, which this Court denied.

from the original action, which we will not review. *In re Waite*, 188 Mich App 189, 197; 468 NW2d 912 (1991).<sup>4</sup>

In addition, Thomas' claim that the trial court erred, in the original action, in denying her motion to revoke the arbitration agreement likewise fails because it is also a collateral attack. *In re Waite*, *supra* at 197. Regardless, although common law arbitration agreements are generally unilaterally revocable any time before the award is announced, *Hetrick*, *supra* at 267-277, when, as here, a stipulated arbitration order was entered by the trial court, a party must first obtain leave of court to revoke the agreement. See *Register v Herrin*, 140 SE2d 82, 83 (Ga App, 1964). In Michigan, stipulated orders that are accepted by the trial court are generally construed under the same rules of construction as contracts and may be revoked only where there is evidence of mistake, fraud, or unconscionable advantage. *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 394; 573 NW2d 336 (1997). In this case, Thomas has not alleged any of these reasons for revoking the arbitration agreement.

With regard to the firm's argument that the arbitration award should be vacated because the arbitrator erred as a matter of law in granting Thomas damages for breach of an oral at-will employment contract, the issue is waived because the firm and individual partners jointly filed the complaint for entry of judgment on the award. "[A] party is not entitled to relief based on an issue that the party's attorney concluded was proper at trial." *Hilgendorf v St John Hosp*, 245 Mich App 670, 696; 630 NW2d 356 (2001). The parties may not seek to vacate on appeal the very order that they sought to enforce in the lower court.

Regardless, had this issue not been waived, there is no basis for vacating the award because the arbitrator did not err as a matter of law in finding that the firm breached its oral at-will employment contract with Thomas. This Court may not review the arbitrator's findings of fact, *Byron Center Pub Schools Bd of Ed*, *supra* at 31, and as Thomas argues, whether an oral contract exists and whether it has been breached are questions of fact, *Bullock v Automobile Club of Michigan*, 146 Mich App 711, 719-720; 381 NW2d 793 (1985), *aff'd* 432 Mich 472 (1989). While the firm argues that it terminated Thomas' employment when it did not give Thomas any work, the arbitrator found that the parties entered into a contract of indefinite duration on December 18, 1997, with the expectation that Thomas would receive a reasonable amount of work. The arbitrator further found that the contract was not terminated until March 30, 1998, when Thomas wrote a letter to the firm alleging breach of the agreement. As the arbitrator noted, the terms of the contract can be determined by the intent of the parties at the time of contracting, even if the terms are not expressly stated. *Redinger v Standard Oil Co*, 6 Mich App 74, 79; 148 NW2d 225 (1967); see also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521; 473 NW2d 652, remanded 446 Mich 864 (1994). Since the arbitrator made a factual determination that an agreement existed and was not terminated until March 30, 1998, the arbitrator's factual conclusion that the firm breached the contract by not giving Thomas a "reasonable" amount of work is not erroneous as a matter of law.

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<sup>4</sup> Further, even if this issue was reviewable, Thomas is judicially estopped from claiming that the arbitrator exceeded his authority by deciding discovery matters because Thomas requested and received a ruling from the arbitrator. See *Park v American Cas Ins Co*, 219 Mich App 62, 67-68; 555 NW2d 720 (1996).

Finally, Thomas argues, in Docket No. 239424, that the trial court abused its discretion in granting the individual partners' motion for taxation of the costs of facilitation and arbitration. We agree. A trial court's decision to tax costs is reviewed for abuse of discretion. *Portelli v IR Const Products Co*, 218 Mich App 591, 604; 544 NW2d 591 (1996). The power to tax costs is wholly statutory. *Elia v Hazen*, 242 Mich App 374, 379; 619 NW2d 1 (2000). Taxation of costs and allowable fees is governed by MCL 600.2401<sup>5</sup> *et seq.* and MCL 600.2501<sup>6</sup> *et seq.* *JC Bldg Corp v Parkhurst Homes*, 217 Mich App 421, 429; 552 NW2d 466 (1996). Costs are not recoverable where there is no statutory authority. *Id.*

Since the arbitration agreement here involves common law arbitration, the provisions of MCR 3.602, the court rule concerning statutory arbitration, and MCL 600.5001 *et seq.*, the arbitration statute, do not apply. Further, "arbitration is not a 'civil action' as defined in MCR 2.101<sup>7</sup> pursuant to the authority given this Court by Const 1963, art 6, § 5." *Kent Co Deputy Sheriffs' Ass'n v Kent County Sheriff*, 463 Mich 353; 616 NW2d 677 (2000) (footnote added).<sup>8</sup> Rather, "an arbitration agreement is a contract by which the parties forgo their rights to proceed in a civil court in lieu of submitting their dispute to a panel of arbitrators." *Beattie, supra* at 577. In this case, although Thomas commenced a civil action against the firm and individual partners, the trial court dismissed the action when it sent the case to arbitration. Therefore, the costs in a civil action provided for by MCR 2.625(A)(1)<sup>9</sup> and MCL 600.2421b(1)<sup>10</sup> may not be awarded as

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<sup>5</sup> MCL 600.2401 provides:

Except as otherwise provided by statute, the supreme court shall by rule regulate the taxation of costs. When costs are allowed in any action or proceeding in the supreme court, the circuit court or the district court the items and amount thereof shall be governed by this chapter except as otherwise provided in this act.

<sup>6</sup> MCL 600.2501 provides:

For the services mentioned in this chapter, hereafter done or performed in the several courts in this state, by the officers thereof, or in any proceeding authorized by law, the fees hereinafter prescribed shall be allowed.

<sup>7</sup> A "civil action" commences with the filing of a complaint with a court. MCR 2.101(B).

<sup>8</sup> See also MCL 600.1901, which provides:

A civil action is commenced by filing a complaint with the court.

<sup>9</sup> MCR 2.625(A)(1) provides:

Costs will be allowed to the prevailing party in an *action*, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action. [Emphasis added.]

<sup>10</sup> MCL 600.2421b(1) provides, in part:

"Costs and fees" means the normal costs incurred in being a party in a *civil action* after an action has been filed with the court, those provided by law or court rule, and include all of the following: . . . [Emphasis added.]

they relate to the common law arbitration proceedings.<sup>11</sup> However, costs would be taxable under MCR 2.625 for expenditures in the subsequent civil action to affirm the arbitration award.

Here, the individual partners submitted an affidavit of costs for facilitation and arbitration fees and the cost of a court stenographer through the arbitration hearings. The trial court granted the individual partners five-sixths of the costs of facilitation and arbitration. The trial court abused its discretion in granting the individual partners these costs because there is no statutory authority for the court to tax costs in common law arbitration.

Further, if the costs were taxable in accordance with MCR 2.625, only those costs actually expended by the “prevailing party” are taxable. In this case, the individual partners and the firm were represented by the same attorney and defended against the same claims. There is no indication of any amount actually spent by the individual partners or that they would be required to repay the firm for the expenses. In addition, the defense of the firm and the individual partners appears to be so intertwined and requiring the same analysis and proofs that the expenses cannot be apportioned. This conclusion is further bolstered by the fact that the individual partners used the taxed costs as a set off to the firm’s debt to Thomas. Therefore, the trial court’s order granting the individual partners’ motion for the costs of facilitation and arbitration is reversed.

The trial court’s order entering judgment on the arbitration award is affirmed. The trial court’s order granting costs to the individual partners is reversed.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Hilda R. Gage

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<sup>11</sup> MCR 3.602(M) specifically grants the right to tax costs “as in civil actions” in statutory arbitration. This court rule acknowledges that costs may not be taxed for common law arbitration because it is not a “civil action,” MCR 2.101, or “any action or proceeding in the supreme court, the circuit court, or the district court . . . .” MCL 600.2401.